

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROGER A. VANCE,

Defendant-Appellant.

UNPUBLISHED

October 9, 2001

No. 226826

Wayne Circuit Court

LC No. 99-007051

Before: K.F. Kelly, P.J., and Hood and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of fourth-degree criminal sexual conduct, MCL 750.520e(1)(b). Defendant was sentenced, as a second habitual offender, MCL 769.10, to eighteen months to three years in prison for the fourth-degree criminal sexual conduct conviction. We affirm.

I

Defendant first argues that the prosecution failed to present sufficient evidence of force or coercion to support his conviction. We disagree. Sufficiency of the evidence claims are reviewed de novo to determine whether there was evidence, viewed in the light most favorable to the prosecution, that would warrant a reasonable trier of fact to find guilt beyond a reasonable doubt. *People v Mayhew*, 236 Mich App 112, 124; 600 NW2d 370 (1999). MCL 750.520e(1)(b)(i) provides, in relevant part:

(1) A person is guilty of criminal sexual conduct in the fourth degree if he or she engages in sexual contact with another person and if any of the following circumstances exist:

* * *

(b) Force or coercion is used to accomplish the sexual contact. Force or coercion includes, but is not limited to, any of the following circumstances:

(i) When the actor overcomes the victim through the actual application of physical force or physical violence.

In the present case, there was evidence that defendant approached the victim from behind, kissed her neck, and stated that he wanted to have sex with her. The victim resisted defendant's attempt to urge her into a bedroom and told defendant "no." Defendant put his hand on the victim's crotch/vaginal area, rubbed her breasts with his hands, and attempted to put his hand down the front of the victim's pants. Such evidence was sufficient to prove force or coercion. MCL 750.520e(1)(b)(i); see *People v Premo*, 213 Mich App 406, 409; 540 NW2d 715 (1995).

II

Defendant next argues that the trial court erred by concluding that fourth-degree criminal sexual conduct is a felony for purposes of sentencing enhancement under the habitual offender statutes. We disagree. We review this alleged error de novo as a question of law. *People v Webb*, 458 Mich 265, 274-275; 580 NW2d 884 (1998).

Although fourth-degree criminal sexual conduct is a two-year misdemeanor, MCL 750.520e(2), it is considered a felony for sentencing purposes, and defendant is subject to enhanced sentencing. *People v McGill*, 131 Mich App 465, 477; 346 NW2d 572 (1984); see *People v DeLong*, 128 Mich App 1, 4; 339 NW2d 659 (1983). The term "felony" is defined under the code of criminal procedure to include a violation of a penal law, which is punishable by imprisonment for more than one year or an offense expressly designated by law to be a felony, MCL 761.1(g). The fact that the Legislature approved the fourth-degree criminal sexual conduct statute after MCL 761.1(g) was enacted into law, and still designated the offense as a misdemeanor, does not change this result. *People v Duenaz*, 148 Mich App 60, 69; 384 NW2d 79 (1985), citing *McGill*, *supra*.

III

Last, defendant argues that the trial court erred in scoring three offense variables prior to sentencing. We disagree. "Appellate review of guidelines calculations is limited, and a sentencing court has discretion in determining the number of points to be scored provided there is evidence on the record that adequately supports a particular score." *People v Cain*, 238 Mich App 95, 129-130; 605 NW2d 28 (2000), quoting *People v Dilling*, 222 Mich App 44, 54; 564 NW2d 56 (1997).

Defendant first challenges the scoring of offense variable ten, exploitation of a vulnerable victim. Ten points may be scored where the offender "exploited the victim's physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status." MCL 777.40(1)(b). "Exploit" means to manipulate a victim for selfish or unethical purposes. MCL 777.40(3)(b). "Vulnerability" means the readily apparent susceptibility of a victim to injury, physical restraint, persuasion, or temptation. MCL 777.40(3)(c). Evidence at trial suggested that prior to the incident, defendant treated the victim like a daughter. The victim lived with defendant for a period of time. The victim testified that on the date of the assault, she went to defendant's home because defendant had agreed to lend her money to pay bills connected with a child custody dispute. Under these circumstances, we cannot conclude that the trial court abused its discretion in adding ten points to offense variable ten.

Defendant next challenges the scoring of offense variable four, psychological injury to the victim. Ten points may be scored where “Serious psychological injury to the victim requiring professional treatment occurred to victim.” MCL 777.34(1)(a). A score of ten points may be given if the serious psychological injury may require professional treatment. In making this determination, the fact that treatment has not been sought is not conclusive. MCL 777.34(2). Here, the victim testified that after the incident, she was trembling and crying. She stated that the incident would affect her for the rest of her life. The victim anticipated having to come into contact with defendant in the future, as defendant’s son is the father of the victim’s child. At the time of sentencing, the victim stated that she continued to feel afraid and vulnerable. Under these circumstances, we cannot find an abuse of discretion with respect to the scoring of offense variable four.

Defendant further challenges the scoring of offense variable thirteen, involving a continuing pattern of criminal behavior. Ten points are to be scored if: “The offense was part of a pattern of felonious criminal activity involving a combination of three or more crimes against a person or property.” MCL 777.43(1)(c). Here, the trial court, relying on the presentence investigation report, determined that two prior sexual assault incidents, one in 1980 and the other in 1990, combined with the current conviction, formed a continuing pattern of criminal behavior. We cannot conclude that the court abused its discretion in scoring offense variable thirteen.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Harold Hood
/s/ Brian K. Zahra